

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

COMMONWEALTH EDISON COMPANY)	
)	Docket No. 16-0259
)	
Annual Formula Rate Update and Revenue Requirement)	
Reconciliation under Section 16-108.5 of the)	
Public Utilities Act)	

**DIRECT TESTIMONY OF MICHAEL L. BROSCHE
ON BEHALF OF THE
PEOPLE OF THE STATE OF ILLINOIS**

AG Exhibit 1.0

JUNE 29, 2016

ILLINOIS COMMERCE COMMISSION DOCKET NO. 16-0259
DIRECT TESTIMONY OF MICHAEL L. BROSCHE

TABLE OF CONTENTS

I.	INTRODUCTION / SUMMARY	1
II.	LAWSUIT SETTLEMENT COSTS.....	3

EXHIBIT LIST

AG Exhibit No. 1.1 Summary of Qualifications

AG Exhibit No. 1.2 Prior Testimony Listing

AG Exhibit No. 1.3 ComEd Response to Request No. AG 13.02 with Attach 1.

AG Exhibit No. 1.4 ComEd Response to Request No. AG 5.03 with Rev Attach
1, and Attachments 2, 3 and 4.

I. INTRODUCTION / SUMMARY

1 **Q. Please state your name and business address.**

2 A. My name is Michael L. Brosch. My business address is PO Box 481934, Kansas
3 City, Missouri 64148-1934.
4

5 **Q. By whom are you employed and in what capacity?**

6 A. I am a principal in the firm Utilitech, Inc., a consulting firm engaged primarily in
7 utility rate and regulation work. The firm's business and my responsibilities are
8 related to the conduct of regulatory projects for utility regulation clients. These
9 services include rate case reviews, cost of service analyses, jurisdictional and class
10 cost allocations, financial studies, rate design analyses, utility reorganization
11 analyses, the design and administration of alternative regulation mechanisms, and
12 focused investigations related to utility operations and ratemaking issues.

13 **Q. On whose behalf are you appearing in this proceeding?**

14 A. I am appearing on behalf of the People of the State of Illinois represented by the
15 Attorney General ("AG").

16 **Q. Will you summarize your educational background and professional experience**
17 **in the field of utility regulation?**

18 A. Yes. AG Exhibit No. 1.1 summarizes my education and professional qualifications.
19 I have testified before utility regulatory agencies in Arizona, Arkansas, California,
20 Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Michigan, Missouri, New Mexico,
21 Ohio, Oklahoma, Texas, Utah, Washington, and Wisconsin in regulatory
22 proceedings involving electric, gas, telephone, water, sewer, transit, and steam

23 utilities. A listing of my previous testimonies in utility regulatory proceedings is set
24 forth in AG Exhibit No. 1.2. As noted in this listing, I have testified in several
25 major Illinois proceedings before the Illinois Commerce Commission (“the
26 Commission” or “ICC”), including multiple cases involving Peoples Gas Light &
27 Coke Company, North Shore Gas Company, Commonwealth Edison Company
28 (“ComEd” or the “Company”), and the Ameren Illinois Utilities (“Ameren”).
29 Those cases include each of the prior five rounds of formula rate case proceedings
30 for ComEd and Ameren.

31 **Q. What is the purpose of your testimony in this docket?**

32 A. My testimony is responsive to the formula rate and revenue requirement
33 calculations of ComEd that are sponsored by various Company witnesses and are
34 summarized in ComEd Exhibit 2.01.¹ I am sponsoring a single adjustment to
35 remove from the Company’s asserted test year expense amounts associated with a
36 class action lawsuit brought against ComEd alleging the Company violated the
37 Telephone Consumer Protection Act (“TCPA”), which was settled with ComEd
38 agreeing to pay \$4.95 million, a portion of which was included in 2015 expenses.

39 **Q. What information have you relied upon in formulating your**
40 **recommendations?**

41 A. I relied upon ComEd’s pre-filed testimony and exhibits in this Docket, as well as
42 the Company’s responses to data requests submitted by the Commission Staff and
43 the AG. I have referenced a copy of Section 16-108.5 of the Public Utilities Act,
44 220 ILCS 5/16-108.5, which was provided to me by AG counsel. I also rely upon

my prior experience with the regulation of public utilities over the past 38 years, including significant experience with alternative forms of regulation for energy utilities in Illinois and other states.

II. LAWSUIT SETTLEMENT COSTS.

Q. Did ComEd record significant expenses in 2015 in connection with a lawsuit alleging the Company violated provisions of the Telephone Consumer Protection Act (“TCPA”)?

A. Yes. The Company’s FERC Form 1 identified litigation associated with the TCPA, stating, “ComEd and the plaintiff agreed in principle to settlement of the suit for \$5 million, with payments to the class commencing in the fourth quarter 2015.” In response to data request AG 5.03, the Company provided quantification of the costs arising from this action and produced copies of the initial complaint, ComEd’s response to the complaint and a copy of the settlement agreement. I have included these documents within AG Exhibit 1.3.

Q. What was the subject of the lawsuit and settlement at issue?

A. In response to AG data request 13.02, ComEd explained that a class action lawsuit was filed as a result of an “Outage Alert Program” in which ComEd sent text messages to all customers on an “opt out” basis. The Company stated in a discovery response that previously, the alerts had been provided on an “opt-in” basis.² In its

¹ ComEd Exhibit 2.01 contains the overall formula rate template calculations and is supported by workpapers contained in ComEd Ex. 2.02 as well as multiple other exhibits.

² AG Ex. 1.4, ComEd Response to AG 13.02(d).

66 response, the Company stated that its range of exposure in this class action was
67 \$600 million to \$1.8 billion.³

68 **Q. What amount of 2015 expense was incurred in connection with this lawsuit?**

69 A. Only about half of the settlement amount was accrued in 2015, resulting in
70 \$2,143,015 in expense included in the instant Distribution Formula Rate Update
71 revenue requirement, after jurisdictional allocation. Attachment 1 to data request
72 AG 13.02 shows an accrual in 2015 for this claim and certain outside legal
73 expenses. I have included a copy of ComEd's response to data request AG 13.02
74 within AG Exhibit 1.4.

75 **Q. Has ComEd already recovered more than half the cost of this litigation from its**
76 **ratepayers through prior year formula rate calculations?**

77 A. Yes. In addition to the 2015 expenses, a prior-year provision for \$2.5 million of
78 anticipated claims cost plus \$0.7 million of litigation expenses were recorded as
79 expense in 2014. These expenses have already flowed into formula rates in the
80 filing submitted by the Company last year.⁴

81 **Q. What is your recommendation with respect to ComEd's 2015 expenses**
82 **associated with the TCPA litigation?**

83 A. I recommend that ratepayers not bear the 2015 portion of expenses for outside
84 counsel and settlement payments resulting from this litigation. Ratepayers have
85 already reimbursed more than half of these costs in last year's formula rate

³ AG Ex. 1.4, ComEd Response to AG 13.02(d).

⁴ According to ComEd's response to AG 13.02, Attach 1, over \$2.5 million in costs were charged to Account 925 in 2014 to "Record outside legal expenses" and to "Record accrual for TCPA damage claim" and these amounts were included, after jurisdictional allocation, in ComEd's reported expenses that were subject to formula rate update calculations last year.

86 calculations, because no issue was raised for consideration by the Commission until
87 now. Non-recovery is appropriate because ComEd could and should have designed
88 its Outage Alert Program to in such a way as to avoid potential litigation and
89 liability under the TCPA. ComEd claims that given the range of financial exposure
90 in this class action -- \$600 million to \$1.8 billion -- the \$4.95 million cost incurred
91 to settle the class action lawsuit, “was the prudent and reasonable decision.”⁵ But
92 whether it was appropriate to settle a lawsuit is not the issue for the Commission’s
93 consideration. What *is* at issue is whether the Company’s unexplained decision to
94 switch the program from an opt-in basis to an opt-out basis imprudently risked
95 ratepayer and shareholder exposure under the TCPA. ComEd’s admission that its
96 actions resulted in a range of financial exposure up to \$1.8 billion should not be
97 rewarded with recovery of those costs from ratepayers.

98 In settlement of the TCPA litigation, ComEd agreed to “prospective relief”
99 that committed the Company to “provide training concerning TCPA compliance to
100 its key managers responsible for customer communications.”⁶ Additionally, ComEd
101 has now added a Preference Center to its comed.com website and mobile
102 application with a primary goal to “give our customers control over when and how
103 they prefer to be contacted”, as more fully explained in the Company’s response to
104 AG 13.02, part e. ComEd has not demonstrated that it acted prudently when it
105 failed to incorporate these measures into the initial design of its customer contact
106 policies and systems.

⁵ *Id.*

⁶ ComEd Response to AG 5.03, Attachment 4, Exhibit 1, page 13.

107 **Q. What amounts should be removed from ComEd expenses to avoid charging**
108 **ratepayers for the 2015 portion of TCPA litigation and settlement expenses?**

109 A. Expenses should be reduced by \$2,143,015 for the settlement accrual, plus \$138,441
110 in related outside legal expenses, for a total jurisdictional adjustment of
111 \$2,281,456.⁷

112 **Q. Does this conclude your testimony at this time?**

113 A. Yes.

⁷ ComEd Supplemental Response to AG 5.03(b). See also ComEd response to AG 13.02 Attach 1 for the “2015 Transactions” prior to jurisdictional allocation.